



## STATE OF OREGON PERSONAL/PROFESSIONAL SERVICES CONTRACT

This Contract is between the State of Oregon, acting by and through its Oregon Department of Forestry hereafter called ODF or **Agency**,

and  
Barnes & Associates, Inc.  
3000 Stewart Parkway, Suite 204  
Roseburg, Oregon 97471  
Ph: 541-673-1208  
Fx: 541-673-9789  
rbarnes@barnesinc.com  
www.barnesinc.com

Hereafter called **Contractor**.

Agency's Contract Administrator for this Contract is

Paul Clements  
Oregon Department of Forestry, Private Forests Program  
2600 State Street, Building D  
Salem, Oregon 97310  
Ph: 503-945-7475  
pclements@odf.state.or.us  
<http://www.oregon.gov/ODF/Pages/index.aspx>

**1. Contract Period.** This Contract becomes effective on the date this Contract has been fully executed by every party and, when required, approved by the Department of Administrative Services and the Department of Justice. Unless extended or terminated earlier in accordance with its terms, this Contract terminates when Agency accepts Contractor's completed performance or on **December 31, 2013**, whichever date occurs last. Contract termination shall not extinguish or prejudice Agency's right to enforce this Contract with respect to any default by Contractor that has not been cured.

**2. Statement of Work.** Contractor shall perform the work (the "Work") as set forth in the Statement of Work, which includes the Delivery Schedule for such Work, and that is attached hereto as Exhibit A. Contractor shall perform the Work in accordance with the terms and conditions of this Contract.

### **3. Consideration**

**a.** The maximum, not-to-exceed compensation payable to Contractor under this Contract, which includes any allowable expenses, is **\$292,937.00**. Agency will not pay Contractor any amount in excess of the not-to-exceed compensation of this Contract for completing the Work, and will not pay for Work performed before the date this Contract becomes effective or after the termination of this Contract. If the maximum compensation is increased by amendment of this Contract, the amendment must be fully effective before Contractor performs Work subject to the amendment.

**b.** Interim payments to Contractor shall be subject to ORS 293.462, and shall be made in accordance with the payment schedule and requirements in Exhibit A.

**c.** Agency will pay only for completed Work that is accepted by Agency in accordance with acceptance criteria set forth in the Request for Proposal (RFP) Section 2.5. Agency shall pay only the amounts supported by invoices that have been approved by Agency as defined in RFP Section 2.5.

**d.** Contractor shall prepare and send monthly invoices to Agency's Contract Administrator for Work performed during that month. The invoices shall describe all Work performed with particularity and by whom it was performed. Each invoice also shall include the total amount invoiced to date by Contractor prior to the current invoice. Contractor will specifically note in the appropriate invoice when it has requested payment for one-third and two-thirds of the maximum, not-to-exceed compensation.

**4. Contract Documents.** This Contract consists of the following documents, which are listed in descending order of precedence: this Contract less all exhibits, attached Exhibit A (Statement of Work), Exhibit B (Required Insurance), and Exhibit C (Independent Contractor Certification). Exhibits A-C are attached hereto and incorporated herein by this reference; Request for Proposal (RFP) ODF 2065-12 and all attachments to that RFP are attached hereto and incorporated herein by this reference.

### **5. Independent Contractor; Responsibility for Taxes and Withholding**

**a.** Contractor shall perform all Work as an independent contractor. The Agency reserves the right (i) to modify the Delivery Schedule for the Work as currently described in the Statement of Work that is attached hereto as Exhibit A, and (ii) to evaluate the quality of the Work Product, as defined by Section 10.a(iii), however, the Agency may not and will not control the means or manner of Contractor's performance. Contractor is responsible for determining the appropriate means and manner of performing the Work.

- b. If Contractor is currently performing work for the State of Oregon or the federal government, Contractor by signature to this Contract, represents and warrants that: Contractor's Work to be performed under this Contract creates no potential or actual conflict of interest as defined by ORS 244 and no statutes, rules or regulations of the state or federal agency for which Contractor currently performs work would prohibit Contractor's Work under this Contract.
- c. Contractor understands and agrees that it is not an "officer", "employee", or "agent" of the Agency, as those terms are used in ORS 30.265.
- d. Contractor shall be responsible for all federal or state taxes applicable to compensation or payments paid to Contractor under this Contract and, unless Contractor is subject to backup withholding, Agency will not withhold from such compensation or payments any amount(s) to cover Contractor's federal or state tax obligations. Contractor is not eligible for any social security, unemployment insurance or workers' compensation benefits from compensation or payments paid to Contractor under this Contract, except as a self-employed individual.

#### **6. Subcontracts, Successors, and Assignments**

- a. Contractor shall not enter into any subcontracts for any of the Work required by this Contract without Agency's prior written consent. In addition to any other provisions Agency may require, Contractor shall include in any permitted subcontract under this Contract provisions to ensure that Agency will receive the benefit of subcontractor performance as if the subcontractor were the Contractor with respect to Sections 5, 6, 7, 9, 10, 11, 14, 15, 16, 18, and 23. Agency's consent to any subcontract shall not relieve Contractor of any of its duties or obligations under this Contract.
- b. The provisions of this Contract shall be binding upon and inure to the benefit of the parties, their respective successors, and permitted assigns, if any.
- c. Contractor shall not assign, delegate or transfer any of its rights or obligations under this Contract without Agency's prior written consent.

**7. No Third Party Beneficiaries.** Agency and Contractor are the only parties to this Contract and are the only parties entitled to enforce the terms of this Contract. Nothing in this Contract gives, is intended to give, or shall be construed to give or provide any benefit or right not held by or made generally available to the public, whether directly, indirectly or otherwise, to third persons unless such third persons are individually identified by name herein and expressly described as intended beneficiaries of the terms of this Contract.

**8. Funds Available and Authorized; Payments.** The State of Oregon's payment obligations under this Contract are conditioned upon Agency's receiving funding, appropriations, limitations, allotments, or other expenditure authority sufficient to allow Agency, in the exercise of its reasonable administrative discretion to meet its payment obligations under this Contract. Contractor is not entitled to receive payment under this Contract from any part of the Oregon state government other than Agency. Nothing in this Agreement is to be construed as permitting any violation of Article XI, section 7 of the Oregon Constitution or any other law regulating liabilities or monetary obligations of the State of Oregon. Agency represents that it has sufficient appropriations and limitation for the current biennium to make payments under this Contract. Contractor understands and agrees that Agency's payment obligation under this Contract is conditioned upon Agency receiving funding, appropriations, limitations, allotments or other expenditure authority sufficient to allow Agency, in the exercise of its reasonable administrative discretion, to continue to meet its payment obligations under this Contract.

#### **9. Representations and Warranties.**

- a. **Contractor's Representations and Warranties.** Contractor represents and warrants to Agency that (1) Contractor has the power and authority to enter into and perform this Contract, (2) this Contract, when executed and delivered, shall be a valid and binding obligation of Contractor enforceable in accordance with its terms, (3) Contractor has the skill and knowledge possessed by well-informed members of its industry, trade or profession and Contractor will apply that skill and knowledge with care and diligence to perform the Work in a professional manner and in accordance with standards prevalent in Contractor's industry, trade or profession, (4) Contractor shall, at all times during the term of this Contract, be qualified, professionally competent, and duly licensed to perform the Work, (5) all computer hardware and software delivered under this Contract will, individually and in combination, correctly process, sequence, and calculate all date and date-related data for all dates prior to, through and after January 1, 2000, (6) any software products delivered under this Contract that process date or date-related data shall recognize, store and transmit date data in a format which explicitly and unambiguously specifies the correct century, and (7) Contractor prepared its proposal related to this Contract, if any, independently from all other proposers, and without collusion, fraud, or other dishonesty.
- b. **Warranties cumulative.** The warranties set forth in this section are in addition to, and not in lieu of, any other warranties provided.

#### **10. Ownership of Work Product.**

a. **Definitions.** As used in this Section 10, and elsewhere in this Contract, the following terms have the meanings set forth below:

(i) "Contractor Intellectual Property" means any intellectual property owned by Contractor and developed independently from the Work.

(ii) "Third Party Intellectual Property" means any intellectual property owned by parties other than Agency or Contractor.

(iii) "Work Product" means every invention, discovery, work of authorship, trade secret or other tangible or intangible item and all intellectual property rights therein that Contractor is required to deliver to Agency pursuant to the Work.

b. **Original Works.** All Work Product created by Contractor pursuant to the Work, including derivative works and compilations, and whether or not such Work Product is considered a work made for hire or an employment to invent, shall be the exclusive property of Agency. Agency and Contractor agree that such original works of authorship are "work made for hire" of which Agency is the author within the meaning of the United States Copyright Act. If for any reason the original Work Product created pursuant to the Work is not "work made for hire," Contractor hereby irrevocably assigns to Agency any and all of its rights, title, and interest in all original Work Product created pursuant to the Work, whether arising from copyright, patent, trademark, trade secret, or any other state or federal intellectual property law or doctrine. Upon Agency's reasonable request, Contractor shall execute such further documents and instruments necessary to fully vest such rights in Agency. Contractor forever waives any and all rights relating to original Work Product created pursuant to the Work, including without limitation, any and all rights arising under 17 USC §106A or any other rights of identification of authorship or rights of approval, restriction or limitation on use or subsequent modifications.

In the event that Work Product created by Contractor under this Contract is a derivative work based on Contractor Intellectual Property, or is a compilation that includes Contractor Intellectual Property, Contractor hereby grants to Agency an irrevocable, non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the pre-existing elements of the Contractor Intellectual Property employed in the Work Product, and to authorize others to do the same on Agency's behalf.

In the event that Work Product created by Contractor under this Contract is a derivative work based on Third Party Intellectual Property, or is a compilation that includes Third Party Intellectual Property, Contractor shall secure on the Agency's behalf and in the name of the Agency an irrevocable,

non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the pre-existing elements of the Third Party Intellectual Property employed in the Work Product, and to authorize others to do the same on Agency's behalf.

**c. Confidentiality of State Information.** Contractor shall hold Confidential Information in strict confidence and shall not use or disclose Confidential Information except as required to perform its obligations pursuant to this Agreement. For the purposes of Section 10, "Confidential Information" means any work product created by Contractor pursuant to this agreement and any information obtained by Contractor in the performance of this Agreement. "Confidential Information" does not include work product or information which is or becomes (other than by disclosure by Contractor) publicly known.

**d. Contractor Intellectual Property.** In the event that Work Product is Contractor Intellectual Property Contractor hereby grants to Agency an irrevocable, non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the Contractor Intellectual Property, and to authorize others to do the same on Agency's behalf.

**e. Third Party Works.** In the event that Work Product is Third Party Intellectual Property, Contractor shall secure on the Agency's behalf and in the name of the Agency, an irrevocable, non-exclusive, perpetual, royalty-free license to use, reproduce, prepare derivative works based upon, distribute copies of, perform and display the Third Party Intellectual Property, and to authorize others to do the same on Agency's behalf.

## **11. Indemnity.**

**a. GENERAL INDEMNITY.** CONTRACTOR SHALL DEFEND, SAVE, HOLD HARMLESS, AND INDEMNIFY THE STATE OF OREGON AND AGENCY AND THEIR OFFICERS, EMPLOYEES AND AGENTS FROM AND AGAINST ALL CLAIMS, SUITS, ACTIONS, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES OF ANY NATURE WHATSOEVER, INCLUDING ATTORNEYS FEES, RESULTING FROM, ARISING OUT OF, OR RELATING TO THE ACTIVITIES OF CONTRACTOR OR ITS OFFICERS, EMPLOYEES, SUBCONTRACTORS, OR AGENTS UNDER THIS CONTRACT.

**b. INDEMNITY FOR INFRINGEMENT CLAIMS.** WITHOUT LIMITING THE GENERALITY OF SECTION 11.a, CONTRACTOR EXPRESSLY AGREES TO DEFEND, INDEMNIFY, AND HOLD AGENCY, THE STATE OF OREGON AND THEIR AGENCIES, SUBDIVISIONS, OFFICERS, DIRECTORS, AGENTS, AND EMPLOYEES HARMLESS FROM ANY AND ALL CLAIMS, SUITS, ACTIONS, LOSSES, LIABILITIES, COSTS, EXPENSES, INCLUDING ATTORNEYS FEES, AND DAMAGES ARISING OUT OF OR RELATED TO ANY CLAIMS THAT THE WORK, THE WORK PRODUCT OR ANY OTHER TANGIBLE OR INTANGIBLE ITEMS DELIVERED TO AGENCY BY CONTRACTOR THAT MAY BE THE SUBJECT OF PROTECTION UNDER ANY STATE OR FEDERAL INTELLECTUAL PROPERTY LAW OR DOCTRINE, OR THE AGENCY'S USE THEREOF, INFRINGES ANY PATENT, COPYRIGHT, TRADE SECRET, TRADEMARK, TRADE DRESS, MASK WORK, UTILITY DESIGN, OR OTHER PROPRIETARY RIGHT OF ANY THIRD PARTY; PROVIDED, THAT STATE SHALL PROVIDE CONTRACTOR WITH PROMPT WRITTEN NOTICE OF ANY INFRINGEMENT CLAIM.

**c. CONTROL OF DEFENSE AND SETTLEMENT.** CONTRACTOR SHALL HAVE CONTROL OF THE DEFENSE AND SETTLEMENT OF ANY CLAIM THAT IS SUBJECT TO SECTIONS 11.a OR 11.b; HOWEVER, NEITHER CONTRACTOR NOR ANY ATTORNEY ENGAGED BY CONTRACTOR SHALL DEFEND THE CLAIM IN THE NAME OF THE STATE OF OREGON OR ANY AGENCY OF THE STATE OF OREGON, NOR PURPORT TO ACT AS LEGAL REPRESENTATIVE OF THE STATE OF OREGON OR ANY OF ITS AGENCIES, WITHOUT FIRST RECEIVING FROM THE OREGON ATTORNEY GENERAL, IN A FORM AND MANNER DETERMINED APPROPRIATE BY THE ATTORNEY GENERAL, AUTHORITY TO ACT AS LEGAL COUNSEL FOR THE STATE OF OREGON, NOR SHALL CONTRACTOR SETTLE ANY CLAIM ON BEHALF OF THE STATE OF OREGON WITHOUT THE APPROVAL OF THE ATTORNEY GENERAL. THE STATE OF OREGON MAY, AT ITS ELECTION AND EXPENSE, ASSUME ITS OWN DEFENSE AND SETTLEMENT IN THE EVENT THAT THE STATE OF OREGON DETERMINES THAT CONTRACTOR IS PROHIBITED FROM DEFENDING THE STATE OF OREGON, OR IS NOT ADEQUATELY DEFENDING THE STATE OF OREGON'S INTERESTS, OR THAT AN IMPORTANT GOVERNMENTAL PRINCIPLE IS AT ISSUE AND THE STATE OF OREGON DESIRES TO ASSUME ITS OWN DEFENSE.

**12. Insurance.** Contractor shall maintain insurance as set forth in Exhibit B, which is attached hereto.

## **13. Default; Remedies; Termination.**

**a. Default by Contractor.** Contractor shall be in default under this Contract if:

(i) Contractor institutes or has instituted against it insolvency, receivership or bankruptcy proceedings, makes an assignment for the benefit of creditors, or ceases doing business on a regular basis; or

(ii) Contractor no longer holds a license or certificate that is required for Contractor to perform its obligations under the Contract and Contractor has not obtained such license or certificate within fourteen (14) calendar days after Agency's notice or such longer period as Agency may specify in such notice; or

(iii) Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the Work under this Contract within the time specified herein or any extension thereof, or so fails to pursue the Work as to endanger Contractor's performance under this Contract in accordance with its terms, and such breach, default or failure is not cured within fourteen (14) calendar days after Agency's notice, or such longer period as Agency may specify in such notice.

**b. Agency's Remedies for Contractor's Default.** In the event Contractor is in default under Section 13.a, Agency may, at its option, pursue any or all of the remedies available to it under this Contract and at law or in equity, including, but not limited to:

(i) termination of this Contract under Section 13.e(ii);

(ii) withholding all monies due for Work and Work Products that Contractor has failed to deliver within any scheduled completion dates or has performed inadequately or defectively;

(iii) initiation of an action or proceeding for damages, specific performance, or declaratory or injunctive relief;

(iv) exercise of its right of setoff.

These remedies are cumulative to the extent the remedies are not inconsistent, and Agency may pursue any remedy or remedies singly, collectively, successively or in any order whatsoever. If a court determines that Contractor was not in default under Sections 13.a, then Contractor shall be entitled to the same remedies as if this Contract was terminated pursuant to Section 13.e(i).

**c. Default by Agency.** Agency shall be in default under this Contract if:

(i) Agency fails to pay Contractor any amount pursuant to the terms of this Contract, and Agency fails to cure such failure within thirty (30) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice; or

(ii) Agency commits any material breach or default of any covenant, warranty, or obligation under this Contract, and such breach or default is not cured within thirty (30) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice.

**d. Contractor's Remedies for Agency's Default.** In the event Agency terminates the Contract under Section 13.e(i), or in the event Agency is in default under Section 13.c and whether or not Contractor elects to exercise its right to terminate the Contract under Section 13.e(iii), Contractor's sole monetary remedy shall be (a) with respect to services compensable on an hourly basis, a claim for unpaid invoices, hours worked within any limits set forth in this Contract but not yet billed, authorized expenses incurred and interest within the limits permitted under ORS 293.462, and (b) with respect to deliverable-based Work, a claim for the sum designated for completing the deliverable multiplied by the percentage of Work completed and accepted by Agency, less previous amounts paid and any claim(s) that Agency has against Contractor. In no event shall Agency be liable to Contractor for any expenses related to termination of this Contract or for anticipated profits. If previous amounts paid to Contractor exceed the amount due to Contractor under this Section 13.d, Contractor shall pay immediately any excess to Agency upon written demand provided in accordance with Section 20 of this Contract.

**e. Termination.**

(i) **Agency's Right to Terminate at its Discretion.** At its sole discretion, Agency may terminate this Contract:

(A) For its convenience, for any reason or no reason, upon thirty (30) calendar days' prior written notice by Agency to Contractor;

(B) Immediately upon written notice if Agency fails to receive lawfully available funding, appropriations, limitations, allotments or other expenditure authority for this Work at levels sufficient to pay for the Work or Work Products; or

(C) Immediately upon written notice if federal or state laws, regulations, or guidelines are modified or interpreted in such a way that the Agency's purchase of the Work or Work Products under this Contract is prohibited or Agency is prohibited from paying for such Work or Work Products from the planned funding source.

(ii) **Agency's Right to Terminate for Cause.** In addition to any other rights and remedies Agency may have under this Contract, Agency may terminate this Contract immediately upon written notice by Agency to Contractor, or at such later date as Agency may establish in such notice, or upon expiration of the time period and with such notice as provided in Section 13.e(ii)(B) and 13.e(ii)(C) below, upon the occurrence of any of the following events:

(A) Contractor is in default under this Section 13.a(i) because Contractor institutes or has instituted against it insolvency, receivership or bankruptcy proceedings, makes an assignment for the benefit of creditors, or ceases doing business on a regular basis;

(B) Contractor is in default under this Section 13.a(ii) because Contractor no longer holds a license or certificate that is required for it to perform services under the Contract and Contractor has not obtained such license or certificate within fourteen (14) calendar days after Agency's notice or such longer period as Agency may specify in such notice; or

(C) Contractor is in default under this Section 13.a(iii) because Contractor commits any material breach or default of any covenant, warranty, obligation or agreement under this Contract, fails to perform the Work under this Contract within the time specified herein or any extension thereof, or so fails to pursue the Work as to endanger Contractor's performance under this Contract in accordance with its terms, and such breach, default or failure is not cured within fourteen (14) calendar days after Agency's notice, or such longer period as Agency may specify in such notice.

(D) Failure of the Contractor to adhere to the Project Work Plan in any form or fashion that compromises the integrity of the data produced by the Contractor, the Delivery Schedule, or the relationships ODF has established with landowners where data is to be gathered may be grounds for contract termination by ODF.

(iii) **Contractor's Right to Terminate for Cause.** Contractor may terminate this Contract with such written notice to Agency as provided in this Sections 13.e(iii)(A) and 13.e(iii)(B) below, or at such later date as Contractor may establish in such notice, upon the occurrence of the following events:

(A) Agency is in default under this Section 13.c(i) because Agency fails to pay Contractor any amount pursuant to the terms of this Contract, and Agency fails to cure such failure within thirty (30) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice; or

(B) Agency is in default under this Section 13.c(ii) because Agency commits any material breach or default of any covenant, warranty, or obligation under this Contract, fails to perform its commitments hereunder within the time specified or any extension thereof, and Agency fails to cure such failure within thirty (30) calendar days after Contractor's notice or such longer period as Contractor may specify in such notice.

(iv) **Return of Property.** Upon termination of this Contract for any reason whatsoever, Contractor shall immediately deliver to Agency all of Agency's property (including without limitation any Work or Work Products for which Agency has made payment in whole or in part) that is in the possession or under the control of Contractor in whatever stage of development and form of recordation such Agency property is expressed or embodied at that time. Upon receiving a notice of termination of this Contract, Contractor shall immediately cease all activities under this Contract, unless Agency expressly directs otherwise in such notice of termination. Upon Agency's request, Contractor shall surrender to anyone Agency designates, all documents, research or objects or other tangible things needed to complete the Work and the Work Products.

**14. Records Maintenance; Access.** Contractor shall maintain all financial records relating to this Contract in accordance with generally accepted accounting principles. In addition, Contractor shall maintain any other records pertinent to this Contract in such a manner as to clearly document Contractor's performance. Contractor acknowledges and agrees that Agency and the Oregon Secretary of State's Office and the federal government and their duly authorized representatives shall have access to such financial records and other books, documents, papers, plans, records of shipments and payments and writings of Contractor that are pertinent to this Contract, whether in paper, electronic or other form, to perform examinations and audits and make excerpts and transcripts. Contractor shall retain and keep accessible all such financial records, books, documents, papers, plans, records of shipments and payments and writings for a minimum of six (6) years, or such longer period as may be required by applicable law, following final payment and termination of this Contract, or until the conclusion of any audit, controversy or litigation arising out of or related to this Contract, whichever date is later.

**15. Compliance with Applicable Law.** Contractor shall comply with all federal, state and local laws, regulations, executive orders and ordinances applicable to the Contract. Without limiting the generality of the foregoing, Contractor expressly agrees to comply with the following laws, regulations and executive orders to the extent they are applicable to the Contract: (i) Titles VI and VII of the Civil Rights Act of 1964, as amended; (ii) Sections 503

and 504 of the Rehabilitation Act of 1973, as amended; (iii) the Americans with Disabilities Act of 1990, as amended; (iv) Executive Order 11246, as amended; (v) the Health Insurance Portability and Accountability Act of 1996; (vi) the Age Discrimination in Employment Act of 1967, as amended, and the Age Discrimination Act of 1975, as amended; (vii) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; (viii) ORS Chapter 659, as amended; (ix) all regulations and administrative rules established pursuant to the foregoing laws; and (x) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations. These laws, regulations and executive orders are incorporated by reference herein to the extent that they are applicable to the Contract and required by law to be so incorporated. Agency's performance under the Contract is conditioned upon Contractor's compliance with the provisions of ORS 279B.220, 279B.225, 279B.230, 279B.235 and 279B.270 which are incorporated by reference herein. Contractor shall, to the maximum extent economically feasible in the performance of this Contract, use recycled paper (as defined in ORS 279A.010(1)(ee)), recycled PETE products (as defined in ORS 279A.010(1)(ff)), and other recycled products (as "recycled product" is defined in ORS 279A.010(1)(gg)).

**16. Foreign Contractor.** If Contractor is not domiciled in or registered to do business in the State of Oregon, Contractor shall promptly provide to the Oregon Department of Revenue and the Secretary of State Corporation Division all information required by those agencies relative to this Contract. Contractor represents and warrants that it has the legal capacity to perform the Work under this Contract in the State of Oregon.

**17. Force Majeure.** Neither Agency nor Contractor shall be held responsible for delay or default caused by fire, riot, acts of God, terrorist acts, or other acts of political sabotage, or war where such cause was beyond the reasonable control of Agency or Contractor, respectively. Contractor shall, however, make all reasonable efforts to remove or eliminate such a cause of delay or default and shall, upon the cessation of the cause, diligently pursue performance of its obligations under this Contract.

**18. Survival.** All rights and obligations shall cease upon termination or expiration of this Contract, except for the rights and obligations set forth in Sections 1, 7, 8, 9, 10, 11, 12, 13, 14, 18, 23, and 24.

**19. Time is of the Essence.** Contractor agrees that time is of the essence under this Contract including but not limited to the Delivery Schedule.

**20. Notice.** Except as otherwise expressly provided in this Contract, any communications between the parties hereto or notices to be given hereunder shall be given in writing by email, personal delivery, facsimile, or mailing the same, postage prepaid, to Contractor or Agency at the address, number or email address set forth in this Contract, or to such other addresses or numbers as either party may indicate pursuant to this Section 20. Any communication or notice so addressed and mailed shall be effective five (5) business days after mailing. Any communication or notice delivered by facsimile shall be effective on the day the transmitting machine generates a receipt of the successful transmission, if transmission was during normal business hours, or on the next business day, if transmission was outside normal business hours of the recipient. To be effective against Agency, any notice transmitted by facsimile must be confirmed by telephone notice to Agency's Contract Administrator. Any communication or notice given by personal delivery shall be effective when actually delivered. Any communication or notice given by email shall be effective upon the sender's receipt of confirmation generated by the recipient's email system that the notice has been received by the recipient's email system.

**21. Severability.** The parties agree that if any term or provision of this Contract is declared by a court of competent jurisdiction to be illegal or in conflict with any law, the validity of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced as if the Contract did not contain the particular term or provision held to be invalid.

**22. Counterparts.** This Contract may be executed in several counterparts, all of which when taken together shall constitute one agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart. Each copy of the Contract so executed shall constitute an original.

**23. Governing Law; Venue; Consent to Jurisdiction.** This Contract shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law. Any claim, action, suit or proceeding (collectively, "Claim") between Agency (or any other agency or department of the State of Oregon, or both) and Contractor that arises from or relates to this Contract shall be brought and conducted solely and exclusively within the Circuit Court of Marion County for the State of Oregon; provided, however, if a Claim must be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon. In no event shall this section be construed as a waiver by the State of Oregon of any form of defense or immunity, whether it is sovereign immunity, governmental immunity, immunity based on the Eleventh Amendment to the Constitution of the United States or otherwise, from any Claim or from the jurisdiction of any court. CONTRACTOR, BY EXECUTION OF THIS CONTRACT, HEREBY CONSENTS TO THE IN PERSONAM JURISDICTION OF SAID COURTS.

**24. Merger Clause; Waiver.** This Contract and attached exhibits constitute the entire agreement between the parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Contract. No waiver, consent, modification or change of terms of this Contract shall bind all parties unless in writing and signed by both parties and all necessary State approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of Agency to enforce any provision of this Contract shall not constitute a waiver by Agency of that or any other provision.

**25. Amendments.**

Agency may amend this Contract to the extent permitted by applicable statutes and administrative rules. Additionally, for Anticipated Amendments (as defined in OAR 125-246-0560(2)(a)(A)) Agency may amend this Contract (i) to the extent provided in the solicitation document, if any, from which this Contract arose, and (ii) to the extent described in Exhibit A. No amendment to this Contract shall be effective unless it is in writing signed by the parties, and all approvals required by applicable law have been obtained before becoming effective.

**26. Contractor Data and Certification.**

**a. Contractor Information.** Contractor shall provide the additional information set forth below.

Name (tax filing): Barnes & Associates, Inc.

Address: 3000 NW Stewart Parkway, Suite 204, Roseburg, OR 97471

Citizenship, if applicable: Non-resident alien ☐ Yes ☒ No

Business Designation (check one):

☐ Professional Corporation ☐ Partnership ☐ Limited Partnership ☐ Limited Liability Company ☐ Limited Liability Partnership  
☐ Sole Proprietorship ☒ Other-Sub S Corporation

**b. Certification.** The individual signing on behalf of Contractor hereby certifies and swears under penalty of perjury that: (a) Contractor is not subject to backup withholding because (i) Contractor is exempt from backup withholding, (ii) Contractor has not been notified by the IRS that Contractor is subject to backup withholding as a result of a failure to report all interest or dividends, or (iii) the IRS has notified Contractor that Contractor is no longer subject to backup withholding; (b) s/he is authorized to act on behalf of Contractor, s/he has authority and knowledge regarding Contractor's payment of taxes, and to the best of her/his knowledge, Contractor is not in violation of any Oregon tax laws named in ORS 305.380(4), including without limitation the state inheritance tax, gift tax, personal income tax, withholding tax, corporation income and excise taxes, amusement device tax, timber taxes, cigarette tax, other tobacco tax, 9-1-1 emergency communications tax, the homeowners and renters property tax relief program and local taxes administered by the Department of Revenue, including the Multnomah County Business Income Tax, Lane Transit District Tax, Tri-Metropolitan Transit District Employer Payroll Tax, and Tri-Metropolitan District Self-Employment Tax; (c) Contractor is an independent contractor as defined in ORS 670.600; and (e) the supplied Contractor data is true and accurate.

CONTRACTOR, BY EXECUTION OF THIS CONTRACT, HEREBY ACKNOWLEDGES THAT CONTRACTOR HAS READ THIS CONTRACT, UNDERSTANDS IT, AND AGREES TO BE BOUND BY ITS TERMS AND CONDITIONS.

CONTRACTORS: YOU WILL NOT BE PAID FOR SERVICES RENDERED PRIOR TO NECESSARY STATE APPROVALS

In witness whereof, the Parties execute this Contract, by and between the State of Oregon, acting

By and Through its Department of Forestry

Authorized Signature: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

Approved by the Department of Administrative Services: Delegation of Authority on File  
(Required for Contracts in excess of \$ 150,000) Authorized Signature \_\_\_\_\_ Date \_\_\_\_\_

Other Required Signature: \_\_\_\_\_  
Other DAS Division of Agency Name/Title \_\_\_\_\_ DAS or Other Agency Signature \_\_\_\_\_ Date \_\_\_\_\_

Approved for Legal Sufficiency: *Julia Marshall* 2/27/13  
Assistant Attorney General Date  
(Required for Contracts in excess of \$150,000)

CONTRACTOR

By: \_\_\_\_\_ Title: \_\_\_\_\_ Date: \_\_\_\_\_

## **EXHIBIT A STATEMENT OF WORK**

### **Part I. General Information**

In 2011, the Oregon Department of Forestry (ODF or Agency) received direction from the legislature that with partial resumption of earlier funding levels, ODF would conduct a Forest Practices Act Compliance Audit and include the private sector (e.g., a third party Contractor) in the effort.

According to the terms of this Contract, a private contractor will gather data that will reflect conditions of roads, skid trails, landings, riparian areas, streambanks, and the margins of wetlands and lakes at predetermined sample sites. Sampling sites (Units) will be limited to harvest units that were harvested in 2010 and 2011. Units will be distributed equally among the three ODF Administrative Areas: Northwest Oregon, Southern Oregon, and Eastern Oregon. Land ownership categories will include industrial forestland, non-industrial privately owned forestland, and other ownerships including state, county, and city ownerships. No federal ownerships will be sampled. The major resource concern for this Compliance Audit is delivery or potential delivery of sediment to Waters of the State.

A core principle in the study is that the Contractor will collect data but will not evaluate rule compliance. This is the purview of ODF. The Contractor will report on specific site conditions and ODF will determine which rules apply to the conditions, and compare the measured conditions against pre-determined criteria for compliance.

The Contractor will be required to submit field data to ODF in digital format using non-proprietary software. The Compliance Audit will include a method for assessing the accuracy and consistency of data collected to ensure the integrity of the expanded values derived from analysis of the data.

### **Part II. Work; Acceptance Criteria; Deliverables and Delivery Schedule.**

#### **Contract Work (RFP Section 2.1)**

The Contractor will conduct data gathering on the two hundred (200) Units listed in section 3 of the Request for Proposal (RFP) according to the procedures outlined in the Project Field Guide (RFP Attachment 3). ODF reserves the right to include replacement Units in the event that landowner permission is not obtained or is rescinded.

The Contractor will go to each of the pre-selected Units and collect data on conditions at the sites. A list of Units and Unit locations, and a map of the ODF Administrative Areas is provided in the Project Field Guide (RFP Attachment 3). The contractor will collect data on five (5) different Data Topics at Units identified by ODF using methods described in the Project Field Guide (RFP Attachment 3). The Data Collection Topics are: (1) general data, (2) roads, (3) waters of the state, (4) stream crossings, and (5) landings and quarries. Some Data Topics may not be represented on every Unit.

The Contractor will provide Unit Data collected at each of the Units to ODF via electronic data files in a manner detailed in an approved Project Communications Plan. ODF will arrange access for Contractor to the Units. The Contractor will not inventory Units for which ODF has not obtained written permission from landowners.

The Contract Administrator represents ODF in matters regarding this Contract, and he/she will periodically inspect the Work for conformance with specifications (e.g., quality control), and to certify Work as acceptable for payment.

The Contractor will assign a Contract Administrator to represent the Contractor; a Deliverables Coordinator who will manage the electronic submittals of field data; Field Foresters who are qualified personnel with knowledge, skills, and abilities to complete this Work. Contractor will create a Project Work Plan that will be approved and signed by both parties prior to commencement of work that details the strategy for the completion of field work and submittal of all data and estimated cost of delivering those services. Contractors will provide all equipment and supplies necessary to complete the surveys, and any other support necessary to enable the Contractor's Field Foresters to conduct this statewide effort as described in this Statement of Work.

ODF will provide the Contractor with contact information for local ODF representatives and offices, copies of Unit Maps for Units to be sampled, permission from landowners to access the Units, a Project Field Guide (RFP Attachment 3), and ODF will carry out periodic inspection of work for compliance (e.g., quality assurance) as described in this Statement of Work.

#### **Schedule of Work (RFP Section 2.3)**

Upon ODF approval of the Project Work Plan (RFP Section 2.1.6.4), the Contractor shall execute and adhere to that plan in order to complete work for this project. The approved Project Work Plan and the Work Completion Schedule contained therein shall constitute the Delivery Schedule under this Contract.

Failure of the Contractor to adhere to the Project Work Plan that compromises the integrity of the data produced, the Delivery Schedule, or the relationships ODF has with landowners may be grounds for contract termination. If warranted, the Work Completion Schedule is subject to amendment with ODF's approval.

Within two (2) weeks after the Contract is executed unless otherwise approved by Agency, the Contractor shall complete the Project Work Plan and submit it to Agency for approval. Contractor shall commence work within two (2) weeks following completion and approval of the Project Work Plan unless otherwise approved by Agency. Contractor will advise Agency weekly of schedule of Units to be visited during the subsequent week to enable Agency to communicate with landowners, arrange access if necessary, and monitor the progress of Contract work.

Work shall be continuous and adhere to the Delivery Schedule unless weather conditions or circumstances beyond Contractor's control, as determined by ODF, prevent working. All Work shall be done during daylight hours and during a time that ODF personnel are available to conduct inspections as described in RFP Section 2.3.1.

If the Delivery Schedule is not met by the Contractor, ODF reserves the right to require Contractor to (1) submit a Written Plan, subject to ODF's approval, describing the action to be taken to correct scheduling deficiencies, or (2) to hire additional crews to correct Delivery Schedule at no additional cost to ODF, or (3) to do both (RFP Section 2.3.3).

#### **Acceptance Criteria**

Observed data submitted to ODF by Contractor must meet specified minimum standards for measurements of presence/absence, length, width, depth, slope, culvert diameter, classification of drainage features, types of road use, hydrologic connectivity, volume and other general data as described in the Project Field Guide (RFP Attachment 3). Acceptability of data submitted by Contractor will be determined by on site review of a select subset of Units. Minimum standards of variability for each data set are listed in the Project Field Guide (RFP Attachment 3).

#### **Tasks and Products (RFP Section 2.4)**

In accordance with the Work Completion Schedule, the Contractor will visit the Units listed in RFP Section 3, and will gather data on the five (5) Data Topics noted in accordance with the procedures identified in the Project Field Guide (RFP Attachment 3).

Contractor will deliver data from individual Units in digital form to ODF in a manner described in the approved Project Communications Plan in groups of ten (10) Units that will comprise a Unit Data Package.

#### **Inspection and Certification**

Before certifying Work as acceptable, ODF will sample Work for compliance with contract specifications on a minimum of 10% of the Units to ensure contract specifications are met as described in RFP 2.4.2.

#### **Delivery Schedule**

Once work under this Contract has commenced, Contractor shall maintain progress at a continuous rate and adhere to the following Delivery Schedule. The Delivery Schedule may be modified by ODF in writing.

#### **Item**

Twenty (20) Units will be completed by  
Sixty (60) Units will be completed by  
One-hundred (100) Units will be completed by  
One-hundred Sixty (160) Units will be completed by  
Two hundred (200) Units will be completed by

#### **Completion Date**

April 19, 2013  
June 21, 2013  
August 2, 2013  
October 4, 2013  
December 20, 2013



**Deliverable Schedule**

<b>Deliverable</b>	<b>Due Date</b>
Project Work Plan	TBD— Within Two Weeks Following Contract Execution
Work Completion Schedule	TBD-Following Contract Execution
Project Communication Plan	TBD-Following Contract Execution
Weekly Sample Area Updates	TBD-Following Contract Execution
Submittal of Unit Data Package upon Completion	TBD – Based on Work Completion Schedule
Unit Payment Package: 1	TBD – Based on Work Completion Schedule
Unit Payment Package: 2	TBD – Based on Work Completion Schedule
Unit Payment Package: 3	TBD – Based on Work Completion Schedule
Unit Payment Package: 4	TBD – Based on Work Completion Schedule
Unit Payment Package: 5	TBD – Based on Work Completion Schedule
Unit Payment Package: 6	TBD – Based on Work Completion Schedule
Unit Payment Package: 7	TBD – Based on Work Completion Schedule
Unit Payment Package: 8	TBD – Based on Work Completion Schedule
Unit Payment Package: 9	TBD – Based on Work Completion Schedule
Unit Payment Package: 10	TBD – Based on Work Completion Schedule

**Part III. Travel and Other Expenses.**

☒ ODF shall not reimburse Contractor for any expenses under this Contract.

**EXHIBIT B**  
**INSURANCE REQUIREMENTS**

**A. REQUIRED INSURANCE.** Contractor shall obtain at Contractor's expense the insurance specified below prior to performing under this Contract and shall maintain it in full force and at its own expense throughout the duration of this Contract and all warranty periods. Contractor shall obtain the following insurance from insurance companies or entities that are authorized to transact the business of insurance and issue coverage in State and that are acceptable to the Oregon Department of Forestry (Agency).

- ☒ **WORKERS COMPENSATION.** All employers, including Contractor, that employ subject workers, as defined in ORS 656.027, shall comply with ORS 656.017 and shall provide workers' compensation insurance coverage for those workers, unless they meet the requirement for an exemption under ORS 656.126(2). Contractor shall require and ensure that each of its subcontractors complies with these requirements.
- ☒ **COMMERCIAL GENERAL LIABILITY.** Commercial General Liability Insurance covering bodily injury, death, and property damage in a form and with coverages that are satisfactory to the State. This insurance shall include personal injury liability, products, and completed operations. Coverage shall be written on an occurrence basis. Contractor shall provide proof of insurance of not less than the following amounts as determined by the Agency: \$1,000,000.00.
- ☒ **AUTOMOBILE LIABILITY INSURANCE.** Automobile Liability Insurance covering all owned, non-owned, or hired vehicles. This coverage may be written in combination with the Commercial General Liability Insurance (with separate limits for "Commercial General Liability" and "Automobile Liability"). Contractor shall provide proof of insurance of not less than the following amounts as determined by the Agency: \$1,000,000.00.
- ☒ **EXCESS/UMBRELLA INSURANCE.**

A combination of primary and excess/umbrella insurance is acceptable. If you are using excess/umbrella insurance to meet the minimum insurance requirement, your certificate must include a list of the policies that fall under the excess/umbrella insurance. Sample wording is "The Excess/Umbrella policy is excess over General Liability, Auto Liability, etc."

**B. ADDITIONAL INSURED.** The Commercial General Liability insurance and Automobile Liability insurance required under this Contract shall include the State of Oregon, its officers, employees and agents as Additional Insureds but only with respect to Contractor's activities to be performed under this Contract. Coverage shall be primary and non-contributory with any other insurance and self-insurance.

**C. "TAIL" COVERAGE.** If any of the required professional liability insurance is on a "claims made" basis, Contractor shall either maintain either "tail" coverage or continuous "claims made" liability coverage, provided the effective date of the continuous "claims made" coverage is on or before the effective date of this Contract, for a minimum of 24 months following the later of (i) Contractor's completion and Agency's acceptance of all Services required under this Contract, or, (ii) The expiration of all warranty periods provided under this Contract. Notwithstanding the foregoing 24-month requirement, if Contractor elects to maintain "tail" coverage and if the maximum time period "tail" coverage reasonably available in the marketplace is less than the 24-month period described above, then Contractor shall maintain "tail" coverage for the maximum time period that "tail" coverage is reasonably available in the marketplace for the coverage required under this Contract. Contractor shall provide to Agency, upon Agency's request, certification of the coverage required under this Section C.

**D. CERTIFICATE(S) OF INSURANCE.** Contractor shall provide to Agency Certificate(s) of Insurance for all required insurance before delivering any Goods and performing any Services required under this Contract. The Certificate(s) must specify all entities and individuals who are endorsed on the policy as Additional Insured (or Loss Payees). Contractor shall pay for all deductibles, self-insured retention, and self-insurance, if any. **The Contractor shall immediately notify the Oregon Department of Forestry of any change in insurance coverage.**

**EXHIBIT C**  
**INDEPENDENT CONTRACTOR CERTIFICATION**

**CONTRACTOR IS AN INDEPENDENT CONTRACTOR**

(An Independent Contractor Certification is required, regardless of corporate status. OAR 125-246-0330(2)(b).)

1. I am free from direction and control over the means and manner of providing the services, subject only to the right of the person for whom the services are provided to specify the desired results;
2. I am registered under ORS Chapter 58, 60, 62, 63, 65, 67, 70 or 648 to provide the services, if such registration is required.
3. I am responsible for obtaining other licenses or certificates necessary to provide the services.
4. I am customarily engaged in an independently established business because three of the following requirements are satisfied:
  - ☒ A. I maintain a business location:
    - 1) That is separate from the business or work location of the person for whom the services are provided; or
    - 2) That is in a portion of my residence, and that portion is used primarily for business.
  - ☒ B. I bear the risk of loss related to the business or the provision of services as shown by factors such as:
    - 1) Entering into a fixed-price contract;
    - 2) Being required to correct defective work;
    - 3) Warranting the services provided; or
    - 4) Negotiating indemnification agreements, or purchasing indemnification liability insurance, performance bonds or errors and omissions insurance.
  - ☒ C. I provide contracted services for two or more different persons within a 12-month period, or routinely engage in business advertising, solicitation or other marketing efforts reasonably calculated to obtain new contracts to provide similar services.
  - ☒ D. I make a significant investment in the business, through means such as:
    - 1) Purchasing tools or equipment necessary to provide the services;
    - 2) Paying for the premises or facilities where the services are provided; or
    - 3) Paying for licenses, certificates or specialized training require to provide the services.
  - ☒ E. I have the authority to hire other persons to provide or to assist in providing the services and have the authority to fire those persons.

(Section 4 does not apply if a Person files a Schedule F as part of an income tax return and the Person provides farm labor or farm services that are reportable on Schedule C of an income tax return.)

Contractor Signature: Ricki N. Barnes

Date 1-11-2013

Name: Ricki N. Barnes

Title: President, Barnes & Associates, Inc.